United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-6191

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 76-6191, 77-6039, 77-6041

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee--Cross-Appellant,

and

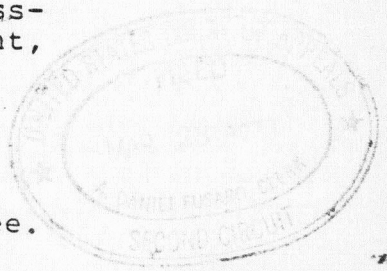
JOSEPHINE McGee,

Plaintiff-Intervenor-Appellee--Cross-Appellant,

v.

KALLIR, PHILIPS, ROSS, INCORPORATED,

Defendant-Appellant--Cross Appellee.



On Appeal from the United States District Court
for the Southern District of New York

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AS APPELLEE--CROSS APPELLANT

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BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS APPELLEE--CROSS APPELLANT

OPINIONS OF THE DISTRICT COURT

The opinion of the district court (Judge Weinfeld) on liability (Supp. A. 332-351)* is reported at 401 F.Supp. 66. The opinion of the

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*/"A." refers to Appendix prepared by defendant, numbered 1 to 300. "Supp. A." refers to Supplemental Appendix prepared by the Equal Employment Opportunity Commission, numbered 301 to 426.

district court on relief (A. 233-252) is reported at 420 F.Supp. 919. The district court's final order entered on November 15, 1976 (A. 286) is not reported. The district court's order of January 20, 1975, granting intervention by McGee and ordering that trial on the merits be advanced and consolidated with the hearing on the preliminary injunction is unofficially reported at 11 FEP Cases 241 (Supp. A. 306).

QUESTIONS PRESENTED

1. Whether the district court's findings that defendant violated Title VII by discharging McGee for engaging in activities protected by section 704(a) of Title VII are clearly erroneous.

2. Whether the district court correctly ruled that McGee was entitled to back pay from her discharge until entry of the decree.

3. Whether the district court erred in refusing to reinstate McGee to the position from which she was discriminatorily discharged or whether, if reinstatement is not ordered, the district court's award of one year's additional salary was within the appropriate exercise of its discretion.

STATUTES INVOLVED

Section 704(a) of Title VII, as amended, 42 U.S.C.§2000e-(3)(a), in pertinent part, provides:

> It shall be an unlawful practice for an employer to discriminate against any of his employees... because he has opposed any practice made an unlawful employment practice by this title, or because he made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

Section 706(g) of Title VII, as amended, 42 U.S.C.§2000e-(5)(g), in pertinent part, provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay ..., or any other equitable relief as the court deems appropriate. Back pay shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

STATEMENT OF THE CASE

These appeals are from a judgment of the district court for the Southern District of New York (by Judge Weinfeld), entered on November 15, 1976, ordering the defendant Kallir, Philips, Ross, Inc. (KPR) to pay plaintiff-intervenor, Josephine McGee, $94,998.98 in damages for discharging McGee in retaliation for conduct protected under section 704(a) of Title VII of the Civil Rights Act of 1964 and refusing McGee reinstatement to her former position (A. 286). The action was filed by the Equal Employment Opportunity Commission (the EEOC) under section 706(f)(1) of Title VII, on July 23, 1974, after McGee's EEOC charge alleging retaliatory discharge was investigated and found to have reasonable cause, and after attempts at conciliation had failed (A. 292-297).[1/] On December 11, 1974, plaintiff-intervenor, through private counsel, sought intervention in the action by means of a motion for a preliminary injunction seeking

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1/ In her EEOC charge, McGee also alleged discrimination in salary (A. 292). The EEOC determination of reasonable cause found that there was insufficient information to rule on this aspect of the charge (A. 296).

immediate reinstatement (Supp. A. 306). The EEOC joined in support of these motions (Supp. A. 334, n.2). The district court granted intervention and ordered that trial on the merits be advanced and consolidated with a hearing on the preliminary injunction (Supp. A. 306). On July 31, 1975, following a two day trial, the court issued a detailed decision on liability, holding that defendant had engaged in retaliatory conduct in violation of section 704(a) of Title VII and that McGee was entitled to an award of damages (Supp. A. 332-351).

On August 19, 1975, plaintiff-intervenor filed a motion, in which the EEOC joined, requesting reinstatement (Supp.A. 352). The court, without deciding the motion, referred the case to a magistrate for a determination of damages, since the parties had been unable to agree on the amount (A. 235). After three days of hearings, the magistrate issued a report on August 31, 1976, recommending that McGee be awarded damages covering the entire period she had been unemployed as a result of defendant's conduct (A. 217-230).[2/]

2/ The hearings were held before Magistrate Hartenstein who died before filing a report. The report was issued by Magistrate Schreiber on the basis of the previous hearings (A. 236-237).

The district court, upon its own review of the entire record, reached the same conclusion (A. 233 -252). In lieu of reinstating McGee to her former position, the court awarded McGee the equivalent of an additional year's salary to cover the period that would be required for her to secure alternate employment similar to the position from which she had been discharged (A. 286).

The defendant appealed from that part of the order determining liability and awarding damages (A. 287). The EEOC and plaintiff-intervenor appealed from the court's refusal to reinstate McGee and the court's deduction of unemployment benefits from the back pay award.[3/]

3/ Plaintiff-Intervenor's brief addresses the issue concerning unemployment insurance benefits.

STATEMENT OF FACTS

A. The Discharge

1. Background

Plaintiff-intervenor, Josephine McGee, was employed by Kallir, Philips, Ross, Inc. (KPR), an advertising agency, from May 15, 1967, to May 15, 1973, when she was discharged. During this period, McGee, who started as an administrative assistant at $8,000 a year, received a number of promotions to positions of increasing responsibility, ending as a senior account executive earning $18,000 a year (A. 17-19). From September 1969 until her discharge, she was assigned to the agency's second largest account, the Upjohn Company, a pharmaceutical house (A. 17-20). When she became a senior account executive in September 1972 her immediate supervisor was Jay Lilker, a senior vice-president, and the account supervisor (A. 20). John Kallir, president and chief executive of KPR, was management representative on the account (A. 22). McGee's responsibilities included almost daily contact with the client to ensure that all the needs of the client were being fullfilled. She worked on marketing plans, and supervised programs for advertising in professional journals (A.20).

John Kallir testified that the agency was generally very pleased with McGee's job performance (A. 69, see 137, 156, 279).

Ms. McGee, who at the time was earning $18,000 as a senior account executive, learned that a male senior account executive was being paid $25,000 (A. 23). On December 4, 1972, at a meeting she had requested with Kallir, she discussed the law about equal pay and asked that her salary be brought into parity with that of her male counterpart (A. 22, 23). On December 13, Kallir advised McGee by memo that her request would be considered by defendant's executive committee in April, 1973, prior to the sixth anniversary of her employment (A. 280,26). On December 15, 1972, McGee filed a complaint with the New York City Commission on Human Rights (NYCCHR) alleging sex discrimination in salary (A. 28).

2. McGee's suspension and discharge.

In January, 1972, the NYCCHR began an investigation of McGee's charge (A. 29). McGee, in response to a request of the investigator assigned to the case, prepared a job description of her duties as senior account executive (A. 30).[4/] The

4/ It appears that at some point during the investigation, KPR submitted to the NYCCHR its statement of the job duties performed by a senior account executive (A. 32; Supp. A. 317).

investigator further suggested that McGee attempt to secure a job description of her position, possibly from the client, which would supplement her own account and accurately describe the functions she performed (A. 30, 53).[5/] As a result of her previous discussion with Kallir, McGee did not believe that she would receive an objective description of her job duties from Kallir (Id., A.48). She therefore asked Phyllis Korzilius, a product manager at Upjohn, with whom she had been working for almost three and a half years (A. 154, 155), if Korzilius would write a letter describing McGee's duties as a senior account executive (Supp.A.311; A. 157,158). McGee told Korzilius about her sex discrimination complaint and the purpose for which the letter would be used, but specifically requested Korzilius not to talk to anyone about the matter (A. 156).

5/ The supervisor of the investigator testified at trial that it is "very common" for a investigator to ask a complainant to obtain "letters of recommendation," especially in cases where the complainant's job performance is at issue (Supp. A. 319).

On March 13, 1973, in accordance with NYCCHR's procedure, an informal fact-finding conference was held to discuss McGee's complaint (A. 31). Those present at the meeting included the investigator, his supervisor, McGee, and, for KPR, Kallir, Norman Cooper, an executive vice-president (A. 278), and counsel (A.31). KPR took the position that Ms. McGee was not entitled to the same pay as other senior account executives because she was not required to perform all duties defendant had described in its statement to the NYCCHR as generally required in that position (A. 144-145; Supp.316-317). The NYCCHR supervisor, in response, produced the letter of Korzilius, dated March 8, 1973, since she believed that the letter indicated that McGee actually performed all such duties (Supp. A. 316-317;A.32-33). At that point, the defendants' representatives became "very, very upset, very angry" (A. 61) about the fact that McGee had involved the client in this matter (A. 76). The meeting was forced to adjourn because of the conduct of defendant's representatives (A.61).

Kallir testified that within a week after the meeting, on March 20th or 21st, the company decided to suspend McGee from the agency (A. 110; Supp. A. 324). Before taking any action Kallir flew to Kalamazoo on March 23rd to inform Upjohn of the decision (Id.). On March 26th Kallir, without discussion, handed McGee a letter informing her that she was suspended and that although KPR would continue her salary for the present, she was not to come to her office for the indefinite future (Pl. Ex. 6, A.13). The reasons stated in the letter for her suspension were that (Id.):

> The protracted nature of our adjourned hearing before the Human Rights Commission; the course you've chosen to follow by involving various individuals, both on the agency's staff and at Upjohn; and your divisive behavior make it increasingly difficult for us to carry on our normal day-to-day activities and provide our client with the service they [sic] require.6/

6/ On March 27th, the defendant circulated a memorandum among its staff as to McGee's suspension which stated, in part (Pl. Ex. 7, A. 14):

> Increasingly,...[McGee] has taken actions which could prove detrimental to our relationship with Upjohn. The agency-client relationship is so sensitive and dependent on complete mutual trust that we can not allow it to be undermined through divisiveness or personal rancor. Thus, she left us no choice but to act as we did.

The following day McGee notified the NYCCHR of her suspension and, at its suggestion, signed a complaint charging the defendant with retaliatory conduct (A. 37). When Morales, the NYCCHR supervisor, called Kallir with respect to the suspension, Kallir's position was that McGee "had discussed the case with other people and clients and that he would not tolerate that" (A. 63-64).[7/]

There was no communication to McGee from the defendant between March 26, and May 15, 1973, when McGee was notified that she was dismissed (A. 40, see 88-90). Kallir admitted that he did not consider anything that transpired after McGee's suspension in making his decision to discharge her (A. 85).

3. KPR's defense

At trial, defendant offered three reasons for its decision to suspend and,ultimately discharge McGee.

a. One reason alleged was McGee's conduct during a meeting with Upjohn officials in

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7/ On April 23, 1973, McGee filed a charge with the EEOC, at the suggestion of NYCCHR, after defendant refused to cooperate further with that Commission's investigation (Supp. A. 318).

February, 1973, at which McGee and Lilker presented preliminary plans for advertising a new product. The meeting was to provide an opportunity for Upjohn and KPR to exchange information about the product and serve as a "dry run" for a later formal presentation to a larger group of Upjohn officials by a team from KPR, including John Kallir, which was held on March 8, 1973 (A.56, 72; Supp. A.313).

Kallir initially testified that Shea, a product manager at Upjohn, had informed him generally, without specific details, that the first presentation "did not go over too well" (A. 75, 70, 72). He said he had been told that McGee interrupted Lilker during the first presentation (A. 75, 73), but could not remember when (A. 75). Shea testified, by deposition, that he had never discussed any matters involving McGee with Kallir prior to March 23, 1973, when Kallir told him that McGee was going to be suspended (A..121-122; see also Supp. A. 326). McGee testified that neither Kallir nor Lilker ever had any discussions with her about her conduct at the first presentation (Supp. A.315).

Although Kallir testified that there was some discussion among KPR officials about whether to allow McGee to partake in the second presentation, he never spoke to McGee about the matter (Supp. A. 315; see A. 101)[8/]. With regard to the second presentation, Shea testified it was conducted in "a competent manner" (A. 118). Kallir conceded that, despite certain reservations of his own, there were no apparent problems in the conduct of the second presentation (A. 99). The general impression of all concerned was that KPR had made "an excellent presentation" (Supp. A. 314; A. 94).

b. Kallir admitted that the disclosure of the Korzilius letter at the fact-finding conference on March 13th was "certainly a turning point" and "the main reason" for suspending McGee (A. 86, 87). Although, before that, company officials had a "feeling" (A. 76) that McGee

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8/ Norman Cooper, an executive vice-president of defendant, failed to mention McGee's conduct during the presentation in a pre-trial affidavit in which he stated that McGee was discharged for soliciting letters of recommendation from Upjohn employees. (A. 278-285). At trial, he testified that McGee's conduct at the presentation, of which he had no personal knowledge, was the main reason for her discharge (A. 131).

had been enlisting some Upjohn employees in support of her complaint, the March 13th conference was the "definite indication" supporting this belief. (Id.). The company offered no evidence that, when it decided to suspend McGee, it was aware of any other employee of Upjohn whom she had told about, or enlisted in support of, her complaint. McGee testified that, with one exception,[9/] she told no other Upjohn employee of her case (Supp. A. 312,330; A. 124-125).

The Upjohn officials informed Kallir that they had "liked Josie" but that her suspension was a matter for Kallir to decide (Supp. A. 325). During the period of McGee's suspension before she was discharged, Jim Penrose, an Upjohn product manager, repeatedly informed Kallir that he was disappointed that McGee was no longer on the Upjohn account (A. 91).

c.Kallir admitted that one of the reasons underlying the suspension of McGee was his concern that she would inform her co-workers of her having filed a charge and

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9/ Subsequent to the March 13th fact-finding conference, McGee asked Jim Penrose, an Upjohn product manager, for permission to use a previously written, unsolicited letter of commendation in her sex discrimination case (Supp. A. 311-312,; A. 126). There is no evidence that the defendant ever became aware of this letter, which McGee decided not to submit to the NYCCHR (A. 76).

advise them of their rights to file their own charges (Supp. A. 322, 320-321).

McGee testified that, prior to her suspension, she mentioned to 3 or 4 co-workers the fact that she had filed a sex discrimination complaint (Supp. A. 308)[10/] but in no case did she engage in a discussion of her complaint since she "didn't want to involve them" (Supp. A. 309). She invited one co-worker out to lunch to talk about the case (Supp. A. 310). Two of the 4 co-workers she informed stated in their pre-trial depositions that they had never told Kallir that they knew that McGee had filed a charge (Supp. A. 322). Kallir admitted that, although he did not know whether McGee had suggested that one of her co-workers file a charge, he felt she might follow McGee's example (Supp. A. 320-321).

3. The district court's decision on liability.

The district court held that the defendant violated Title VII by suspending and discharging McGee in retaliation for her engaging in conduct protected by section 704(a) of the Act. The court found that

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10/ McGee told her secretary so that she would be aware if the NYCCHR investigator called (Supp.A. 310).

McGee's solicitation of the Korzilius letter was a "substantial cause" of her discharge (Supp. A. 344). While expressing the view that an employee's attempts to gather evidence in support of a claim lose the protection of section 704(a) when they are excessive and calculated to inflict needless economic harm on the employer, the court found no such circumstances in this case (Id.). It concluded that to hold McGee's "discreet solicitation" of a relevant letter a justified reason for discharge "because of its [defendant's] excessive squeamishness about relations with a client" would denude of all substance the stautory right in §704(a) of a person to assist and participate in the investigation of her charge (Supp. A. 345).

The court also found that defendant discharged McGee because she discussed her charge with other female employees. It concluded that since section 704(a) prohibits discrimination against persons who attempt to protest allegedly discriminatory conditions of employment, the provision "necessarily protects an employee from retaliation for merely advising follow employees of their rights under the law" (Supp. A. 341). The court found that, there was no evidence of disruptive conduct by McGee (Id.).

The court characterized defendant's contention that it suspended McGee because of her conduct at the preliminary presentation held at Upjohn in early February as "sheer pretext advanced for the first time at the trial, more than two years after the event." (Supp. A. 347). The court noted that after the presentation neither Kallir nor Lilker talked to McGee about her actions and that she was allowed to participate in the very important final presentation. It also noted that the alleged misconduct was never offered as a reason for discharge at the NYCCHR fact-finding conference, to the investigator who inquired about the reason for the suspension, and was not mentioned in defendant's letter of suspension to McGee and explanatory memorandum to the staff (Supp. A. 348-49).

B. Relief

After the parties were unable to agree on damages, the court referred the matter to a magistrate. The hearings dealt primarily with the question of whether McGee acted reasonably in attempting to obtain alternative employment under the provision of section 706(g) of Title VII which requires that "amounts earnable with reasonable diligence" be deducted from the gross amount of back pay suffered.

1. McGee's efforts to secure employment.

McGee's experience and skills involved the fairly limited and specialized field of pharmaceutical advertising with respect to prescription drugs (A.57; Supp. A. 371-372). This type of "ethical" advertising is directed at physicians, generally through medical journals and related publications (A. 199; Supp.A. 362). It is different from consumer advertising which is concerned with products sold "over the counter" to the public and advertised through popular print and broadcast media (Id., see A. 190). There are no more than 20 pharmaceutical advertising agencies in New York City (A.214, 210, 204; Supp. A. 370, 389A-390).

Almost immediately after her discharge, McGee began searching for new employment (A. 174). She attended and sought work at the regular meetings of the Pharmaceutical Advertising Club (PAC), an organization composed of persons and organizations involved in the pharmaceutical field (Supp. A.383-384,390).[11/] McGee testified that PAC serves as "the biggest employment agency of them all" (Supp.A.386), since it provides a forum for gaining contacts with everyone in the industry

11/ She continued to attend these meetings throughout 1973 and most of 1974 until her membership expired and she no longer could afford to attend (Supp. A. 383-384, 386, 390).

and provides an opportunity to discover where openings exist (Supp. A. 384, 386). Defendant's personel expert, Mr. Braunworth, of William Douglas McAdams, the largest pharmaceutical advertising firm in the industry, conceded that attending PAC meetings was a standard practice in the industry for finding leads for employment. (Supp. A. 399, 420, 394).

In November, 1973, McGee applied for a position at William Douglas McAdams where she had heard there was an opening (Supp.A.400, 367A-368). Braunworth interviewed McGee, who presented him a resume, but did not offer her the job (Supp. A. 401, 400A).[12/] He testified that he was looking for a person with a background in sales and promotion rather than a person with a secretarial background who had moved into account management (Supp.A. 410). He did not consider McGee for any of the approximately eight positions he had filled over the last several years (Supp. A. 415, 410, 414). Braunworth also considered the fact that McGee, at the time of her interview, had not been

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12/ McGee called Braunworth a few weeks after her interview but was told that she would not be offered a position (Supp. A. 402). Braunworth wrote her a letter, dated December 6, 1973, to the same effect, which concluded that "[s]hould another pertinent position open up, I would be very pleased to get in touch with you again" (Pl. Ex. 12, Supp. A. 331).

employed for eight and a half months (presumably counting the period of her suspension)(Supp. A.421).

McGee also contacted the second largest ethical advertising agency, Sudler & Hennesey, but was told that there were no openings (Supp.A.368).[13/] McGee attempted to set up an interview through a contact with J. Walter Thompson, a large consumer agency with a medical department, but nothing materialized (Supp. A. 372-373). She also contacted L.W. Frolich (Supp. A. 379), Ted Bates and Company (Supp. A. 380), and Norman, Craig, Kunnel, a consumer agency (Supp. A. 425-426, 373; A. 216).

She sought employment with ten firms in related areas, such as trade publications and companies which organized audio-visual medical seminars (A. 174,176; Supp. A. 364,365, 366, 367, 373A, 379, 380) having had experience with the defendant in organizing seminars of this type (A. 175-176). McGee testified that one trade publications employer was afraid to hire her because of possible retaliation by defendant (Supp A. 365-366, 387-388).

13/ Braunworth testified that this agency also maintained the practice of preferring persons with product management (sales and promotion) backgrounds (Supp. A. 413, see A. 199).

McGee also registered with several employment agencies (Supp. A. 381-82, A. 179). Archer agency, an agency which filled openings for account executives in the ethical advertising field, referred her resume to Braunworth of William Douglas McAdams (Supp.A. 403-404). A management consulting firm, which had been engaged in a search for an advertising account manager for a client, contacted McGee, but was unable to arrange for her placement because McGee, who has a medical condition which requires treatment,[14/] could not be covered under its client's medical insurance program (Supp.A.358). McGee testified that she did not register at additional employment agencies specializing in the ethical advertising field because, by the end of the first year after her discharge, everyone in her field knew she was looking for work and she believed the contacts she made at PAC meetings covered the industry (Supp. A. 385-386).

14/ McGee has suffered since 1958 from a disease known as systematic lupus erythmatosis, in which the body rejects its own cells, somewhat like in an organ transplant (Supp.A.359-61). The disease has not affected McGee's job performance (Supp.A.424) but requires that she receive regular treatment and medication (Affidavit of Martin Meltzer, M.D., Supp.A.304-305). It therefore is essential that McGee secure employment with an agency which has a comprehensive health insurance plan under which she would be covered as she was with the defendant (Supp.A.319A).

McGee also applied at two government agencies, but did not receive job offers (Supp.A.374,378).[15/]

McGee testified that, after September 30, 1975, when her attorneys filed a motion to reinstate her to her former position with the defendant (see supra, at 5) following the district court's ruling on liability, she "stopped looking for work" (A. 188). She did not remove herself from the labor market. Braunworth, defendant's expert, testified that he would inquire as to the availability of a person as long as two years after an initial contact (Supp.A.357-358). McGee remained registered with the employment agencies she had previously contacted (Supp.A.377). Both of defendant's experts testified that after the spring of 1975, very few people were hired in the industry (Supp.A.392, A.208).

2. The district court's decision

The district court, on review of the entire record, concluded, as had the magistrate, that defendant had failed to establish that McGee's back pay should be

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15/ McGee was interviewed three times for a position at Rockefeller University editing scientific manuscripts, but was ultimately told that she would not be offered the position because she was considered overqualified (Supp.A.375-376).

reduced other than by interim earnings (A.243-249; 220-229).[16/] The court held that prior to September, 1975, McGee made reasonably diligent efforts to secure employment (A. 247). It noted that the use of "word-of-mouth contact was an effective means of seeking job opportunities" (Id.). The court also ruled that in view of the very poor opportunity for employment in the field during 1975 defendant failed to show that plaintiff would have found work if she had been more active (A. 248).

The court refused to order that McGee be reinstated to her former position (A. 249-251). It recognized that ordinarily reinstatement would be the appropriate means of providing complete relief to a party who had been discriminatorily discharged, but concluded that, after 3 1/2 years of bitterly contested litigation, the trust necessary for effective job performance in the position involved in this case could not be restored (Id.).

16/ During the period at issue, McGee earned $1,400 from the Girls Scout's of America for temporary secretarial work performed during a convention of that organization (Supp.A.383).

The court, concluding that it would be "unjust" to deny reinstatement without giving McGee a fair opportunity to find other employment (A. 251), awarded McGee an additional one year's salary to cover the period of time it should take McGee, under existing conditions, to find employment at a salary commensurate with her skills (Id.).

I

THE DISTRICT COURT PROPERLY HELD THAT DEFENDANT VIOLATED TITLE VII BY DISCHARGING McGEE FOR ENGAGING IN ACTIVITIES PROTECTED BY SECTION 704(a) OF THE ACT

The district court held that the defendant discharged McGee without justification for engaging in conduct protected by section 704(a) of Title VII. It reached its decision after a full consideration of the evidence, including the defendant's alleged motivations for discharging McGee, and the nature of McGee's conduct (Supp.A.339-340). Under the "clearly erroneous" standard of Rule 52, F.R.Civ.P., the court's findings must be sustained unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). The record in this case provides ample factual support for the district court's findings.

A. The District Court's Ruling That Defendant Violated Title VII Is Supported By the Finding That "a substantial cause" of McGee's Discharge Was Her Solicitation of the Korzilius Letter.

Admittedly, McGee's discharge was precipitated by her solicitation of the letter from Korzilius of Upjohn as to the nature of the duties she performed. Defendant argues that in finding this a violation

of Title VII, the lower court applied erroneous legal standards. In essence, it argues as does the amicus curiae brief filed in its behalf, that, in view of the sensitive nature of the client-agency relationship in the advertising industry, an employee may be discharged whenever she informs an employee of a client of her discrimination complaint, regardless of the reason for doing so and no matter how discreet and circumspect the conduct. The district court properly declined to place the advertising industry above the specific provisions of federal law. Refusing to abdicate its responsibility as final arbiter under Title VII (Alexander v. Gardner-Denver, 415 U.S. 36,47), it observed that "[p]laintiff's statutory right to engage in the protected activity of assisting and participating in the investigation of her charge against defendant would be without substance if defendant could justify her discharge based upon her discreet solicitation of a letter setting forth the nature of her work because of its excessive squeamishness about relations with a client" (Supp.A. 344-345).

The defendant contends that the legality of McGee's discharge should be judged solely on the

basis of whether it acted reasonably and in good faith in believing that such action was necessary to protect its business relationship with Upjohn (Def. br., at 18,23). "Good faith" is not a relevant consideration in judging the propriety of an employer's actions in response to an employee's protected actitivies. As the Supreme Court stated in NLRB v. Burnup & Sims, 379 U.S. 21, 23 (1964):

> A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it even though the defendant acts in good faith.17/

The standard that should be applied is a "rule of reason" which encompasses "a balance of the setting in which the activity arises and the

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17/ Defendant inappropriately relies on EEOC v. Children's Hospital, 415 F.Supp. 1345, 1350 (W.D. Pa. 1976), for the proposition that matters of this kind are controlled by the "well established subjective test of good faith" (Def. br. at 17). The court there found that the charging party's discharge was based solely on the hospital's good faith belief that its funds were to be reduced requiring a reduction in personnel. "Good faith" in that case referred to the fact that the actual reason for termination was unrelated to the filing of the charge. In this case, the "actual reason" for McGee's discharge was her solicitation of the Korzilius letter in order to establish her charge.

interests and motivations of both the employee and the employer." Hochstadt v. Worcester Foundation, Inc., 545 F.2d 222, 232 (1st Cir. 1976). The reasonableness of the balance struck by the trier of fact should be accorded the same deference as any other factual findings. Hochstadt, supra, at 234. Under these standards, the court's conclusion that the defendant was not justified in discharging McGee was clearly correct.

a. The defendant had no reasonable basis for fearing that either McGee's charge or the solicitation of the Korzilius letter would impair its relationship with Upjohn. It decided to suspend McGee immediately after it found out about the Korzilius letter without attempting to ascertain the circumstances under which the letter was obtained or whether its solicitation would have any adverse affect on its relationship with Upjohn. After Kallir did talk to Shea and Henry of Upjohn on March 23rd to inform them of the defendant's decision regarding McGee, the defendant had even less reason to believe that the McGee charge would affect its business relationship. Henry, the higher ranking company officer (Supp.A.323-324), assured Kallir

> I wasn't [going] to look upon the agency as being less effective or a less credible agency in my eyes given his problem. I didn't see how it, at least to that point, had affected us or even how it might (Supp.A.323).18/

Both Henry and Shea specifically told Kallir that they "liked Josie" (Supp.A.325). They did not suggest that she be taken off the account (Id.) Several times before McGee was actually discharged, Jim Penrose, a product manager of Upjohn, told Kallir that he was disappointed that McGee was no longer on the account (A.91).

18/ Henry did agree, in response to a question from defendant's counsel, that if the matter was raised to the level of Upjohn's president or chairman, the relationship of the defendant with Upjohn could be affected (A.119). There was, however, no basis for believing that McGee would take any such action. Although Shea told Kallir that several people at Upjohn knew about McGee's complaint (A.84), McGee's testimony that she told only Korzilius and, later Penrose, was uncontradicted. Shea admitted that McGee had never discussed the matter with him (A.124). Henry testified that he had no knowledge of the incident at all until the meeting when Kallir brought it up (Supp.A.326-330). Thus, it was the defendant's officer, rather than McGee, who endowed the matter with significance.

The defendant argues (Br., at 17) that the court improperly based its ruling on the fact that McGee's solicitation of the letter turned out not to have any deleterious effect on the agency-client relationship, rather than on defendant's reasonable belief that it would. The effect an action has is at least relevant in determining what effect it may have been expected to have. More importantly, the court explicity stated (Supp.A. 346):

> The defendant's claim that retention of good rapport with its client required plaintiff be taken off the account is belied by the record. The fact is that nothing plaintiff said or did in any way affected the relationship between defendant and Upjohn.

In the context of the facts discussed above--defendant's precipitous suspension without inquiry, and its discharge of McGee after assurances that the matter would not affect its relationship with Upjohn--the court properly found that the defendant had no legitimate basis to believe its relationship with Upjohn was in jeopardy at the

time it discharged McGee.[19]

b. The court also properly found that neither the means nor the manner employed by McGee in soliciting the Korzilius letter were beyond the bounds of reasonable conduct protected by Title VII. The court found that McGee's action of soliciting a letter from an Upjohn employee was "circumspect" (Supp.A.343) and "discreet" (Supp. 345) and that there was nothing "wrong or disruptive" about McGee's action (Supp.A. 342-343). Korzilius was intimately familiar with the work McGee actually performed on the job (A.45), information clearly relevant to a determination of whether or not McGee performed all duties required of senior account executives who received higher salaries. McGee expressly asked

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19/ The defendant contends that the reasonableness of its belief regarding the need to discharge McGee is unreviewable (Br., at 22,18), citing the case of Goodloe v. Martin Marietta Corp., 7 FEP Cases 964 (D. Colo. 1972), affirmed without opinion, 10 FEP Cases 1176 (10th Cir. 1974). The holding in that case was merely that where an employee engaged in objectionable conduct--in that case uttering obscenities and engaging in a fight--there must be some evidence to show that the employer's decision to terminate that employee was motivated by the fact that the employee had previously filed a charge and not by the employee's egregious conduct.

Korzilius to keep the matter confidential (A. 156). Thus, this case is clearly distinguishable from any of the cases cited by the defendant upholding discharges which resulted from excessive and disruptive means employed in pursuing protected activity.

The courts have recognized that section 704 (a) of Title VII provides employees with broad protection to pursue conduct in support of the statutorily stated objective of eliminating employment discrimination. Pettway v. American Cast Iron Pipe Co., 411 F.2d 998, 1005 (5th Cir. 1969). The protection afforded by the section is, on its face, greater than that of §8(a)(4) of the National Labor Relations Act, 29 U.S.C. §158(a)(4), since, in addition to covering the right of employees to file charges and give testimony, it also specifically protects the right of employees to assist and participate "in any manner" in an investigation of a complaint filed under the statute. Pettway, supra, at 1005-1006, n. 18. Since information secured during the course of an investigation is often obtained through the complainant, "[r]igid

enforcement against retaliatory action is," as the court below indicated, "required to assure the effectiveness of the Act." (Supp.A. 345). While the protection of the section does not "compel an employer to absolve and rehire one who has engaged in. . . deliberate, unlawful activity against it," McDonnell Douglas v. Green, 411 U.S. 792, 803 (1973), nor prevent an employer from discharging an employee for adopting unreasonable, disruptive means for carrying out his protected activity, Hochstadt v. Worcester Foundation, 545 F.2d 222, 232-233 (1st Cir. 1976), reasonable activity in support of a claim is entitled to protection.

The defendant claims that McGee's actions amount to the type of disloyalty that removes an employee from the protection of the Act. The cases it cites to support its assertion serve only to emphasize the difference between the type of action that merits discharge and the activity here involved. In Hochstadt, supra, a research scientist at a foundation, in an effort to pursue her sex discrimination claims, engaged in an extended series of disruptive acts which prevented other employees

from performing their research (at 233). The acts of disloyalty in that case included spreading assertions that the foundation would lose its federal funding which had a substantially disputive effect on the normal operation of the foundation (Id.). In NLRB v. Red Top, Inc., 455 F.2d 721, 727 (8th Cir. 1972), an employee threatened to engage in actions which were "clearly designed to hit the employer where it would hurt", by interfering with its business relations with its customers solely for the purpose of gaining acceptance of his own demands, in effect, blackmailing the employer.[20/] In contrast, McGee's action was for a legitimate purpose and was neither intended to, nor reasonably could be expected to have, an adverse effect on defendant's business. The district court noted:

> Under some circumstances, an employee's conduct in gathering or attempting to gather evidence to support his charge

20/ In International Brotherhood of Teamsters v. NLRB, 365 U.S. 667, 679 (1961) (Harlan, J., concurring), cited by the defendant, Justice Harlan was discussing the situation where a general policy which was unquestionably adopted for reasonable business reasons nevertheless could have the effect of encouraging or discouraging union activity. The reasonableness of the employer's conduct here is not unquestioned.

> may be so excessive and so deliberately calculated to inflict needless economic hardship on the employer that the employee loses the protection of section 704(a)....But this is not such a case.

There is no reason to upset this finding.

B. The District Court Correctly Found That Defendant Illegally Discharged McGee For Informing Coworkers That She Filed A Charge of Discrimination And Advising Them Of Their Rights Under The Employment Discrimination Laws.

The defendant conceded that one of its reasons for discharging McGee was that she had informed her coworkers of her claim of discrimination and advised them of their right to file their own claim. Defendant made no attempt to show that this conduct was disruptive and the court found that there was no evidence to suggest that it was (Supp.A.341). It therefore concluded that "[i]n discharging plaintiff, at least in part because she engaged in these protected activities, defendant violated the statute" (Id.).

The defendant claims that if McGee's actions were taken during "company time" they would not have been protected and that, because the record does not reveal any evidence as to this matter, the case

should be remanded to allow it a second opportunity to offer such evidence (Def. Br. at 29-30). The defendant's failure to present any evidence as to whether McGee's conduct occurred during "company time" is a clear indication that the defendant did not discharge her for that reason. The concern about "company time" is therefore irrelevant.

The cases relied on by the defendant (Def. br. at 28) are clearly inapposite. They present the question of whether, under the National Labor Relations Act, an employer can enforce a previously promulgated reasonable rule prohibiting union solicitation during "company time". See Republic Aviation Corp v. NLRB, 324 U.S. 793, 803, n.10 (1945). There is no indication that defendant had any such rule here or even that McGee's actions amounted to kind of solicitation that could be prohibited by such a rule.[21/]

21/ The defendant also contends that the court erred in holding that this ground alone is sufficient to establish that defendant violated the Act. The short answer is that the court found that none of the defendant's alleged reasons justified McGee's discharge.

C. The Court's Finding That McGee Was Not Discharged For Her Conduct During The February, 1973, Presentation Meeting At Upjohn Is Amply Supported By The Record.

The record fully supports the district court's determination that McGee's conduct at the February, 1973, presentation meeting at Upjohn was not a factor in defendant's decision to discharge her (Supp.A.349-350).

As noted above, the main reason defendant discharged McGee was admittedly the solicitation of the Korzilius letter. Since the solicitation of that letter was protected conduct, the defendant would be liable for discharging McGee for that reason, even if the presentation meeting were a factor in her discharge. It is well settled that, if a discharge is, in significant part, motivated by protected activity, the discharge is unlawful. See NLRB v. Park Edge Sheridan Meats, Inc., 341 F.2d 725, 728 (2d Cir. 1965); NLRB v. George T. Roberts & Sons, Inc., 451 F.2d 941 (2d Cir. 1971). See also Hochstadt v. Worcester Foundation, supra, 545 F.2d at 522, and cases cited therein.

In addition, there is ample support for the court's finding that this justification is "sheer pretext advanced for the first time at the trial,

more than two years after the event" (Supp.A.347). Despite the alleged significance of the February presentation in the defendant's decision to discharge McGee, defendant, without ever having discussed her alleged misconduct with McGee, allowed her to participate in the very important, formal second presentation (Statement, at 14)[22/]. Immediately after McGee's suspension, Kallir told Morales of the NYCCHR that McGee was suspended because "she had discussed the case with other people and clients and that he would not tolerate that" (A.63-64). In a pre-trial affidavit, Norman Cooper, an executive vice-president of defendant, swore that the reason for McGee's discharge was her effort to obtain a job description from Upjohn employees for use in the investigation of her case (A.281-282). The trial court properly

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22/ Even accepting defendant's reasons for allowing McGee to participate at the second presentation (Def. br., at 26), there is no explanation of the fact that defendant did not ever mention to McGee anything about her conduct at the first presentation before the "big day."

accorded little credit to the change in position at trial (see A.131).[23/]

23/ The court also stated that the defendant had not included the reason of McGee's conduct at the first presentation in its suspension letter to McGee or memorandum informing the defendant's staff of McGee's suspension (Supp.A.349). Defendant takes issue with the court's reading of these documents, which it claims, if properly "construe[d]" "inferentially refer" to the February, 1973, presentation (Def. br., 25). While it is defendant's construction which is strained, the matter is of no great moment in view of the other evidence.

II
THE DISTRICT COURT CORRECTLY RULED THAT McGEE WAS ENTITLED TO BACK PAY COVERING THE PERIOD FROM HER DISCHARGE UNTIL ENTRY OF THE DECREE

Under Section 706(g) Title VII, amounts that would have been earned with reasonably diligent efforts to secure alternative employment must be deducted from a back pay award. The district court concluded in this case that this provision did not require any deductions from McGee's award for the period from her discharge until the decree was entered. As to the period from her discharge until September, 1975, the court found that McGee had made reasonably diligent efforts to obtain employment. For the period after September, 1975, during which she ceased actively searching for employment after seeking reinstatement following the court's holding that the defendant violated Title VII, the court held that, in view of the poor market conditions in the industry there was no showing that she would have obtained employment if she had remained more active. Both of these rulings are well supported in the record and are in accord with relevant case law.

A. The District Court Properly Found That McGee Exercised Reasonable Diligence in Attempting to Obtain Alternative Employment Prior to September, 1973.

The district court found that McGee made reasonably diligent efforts to obtain employment through September, 1975. Under Rule 52, F.R. Civ. P., this finding must be affirmed unless "clearly erroneous". The defendant's argument is, in essence, that this Court should accept its view as to reasonableness instead of the finding of the district court.

McGee's efforts to seek employment were within the range of reasonable conduct expected of a person in her circumstances.[24/] As the court found, and the defendant admits (Def. br., at 35),

24/ As the Court stated (A.245):

> The range of reasonable conduct is broad and the injured plaintiff must be given the benefit of every doubt in assessing her conduct.

See Williams v. Albemarle City Board of Education, 508 F.2d 1242, 1243 (4th Cir. 1974); Kaplan v. IATSE, 525 F.2d 1354, 1363 (9th Cir. 1975); cf. Ellerman Lines, Ltd. v. The President Harding, 288 F.2d 288, 290 (2d Cir. 1961).

McGee's experience and skills were in a highly specialized, fairly limited, and very inbred field of pharmaceutical advertising, in which there are no more than 20 agencies (A. 214, 166). McGee therefore reasonably chose to rely to a great extent on industry contacts to gain employment leads.

She attended and sought work at the monthly meetings of the Pharmaceutical Advertising Club (PAC), whose membership includes persons and organizations in the pharmaceutical advertising field (Supp.A.383-384,390). PAC serves as "the biggest employment agency of them all" (Supp. A. 386), since it provides a forum for gaining contacts within the industry and an opportunity to discover where openings exist. (Supp. A. 384, 386). There McGee would tell as many people as she could that she was seeking employment (Supp. A. 390-391). Defendant's own personnel expert, Braunworth, conceded that attendance at PAC meetings is a standard practice in the industry for obtaining job leads (Supp. A. 399).

In addition, McGee individually contacted or attempted to contact at least five ethical advertising

agencies.[25] In late 1973, she contacted and was interviewed by Braunworth, defendant's personnel expert, for an opening at William McAdams Douglas, the industry's largest pharmaceutical advertising agency (Statement, supra, at 20). Braunworth testified that his agency and others looked for persons having a sales and promotion background which McGee, who had worked her way up from a secretarial position, did not possess (Id.).[26] Although Braunworth wrote McGee that he would contact her again if a "pertinent position" should become available (Supp. A. 331), he did not consider her for any of the eight positions he subsequently filled over the next several years (Supp.A. 415, 410, 414).

25/ The defendant erroneously states repeatedly (Def. br., at 35,36,38) that McGee contacted two ethical advertising firms. The district court found that she contacted or attempted to contact 7 advertising agencies (A. 246) and the record clearly establishes that 5 of them were ethical advertising agencies (Supp.A. 368-369,372-373,379,380-381; See A. 223-224).

26/ Braunworth testified that other ethical agencies, including Sudler & Hennesey, the second largest agency, had a similar policy.

McGee contacted the second largest ethical agency, Sudler & Hennesey, but was told there were no openings (Supp.A.368). She attempted to set up an interview, through an industry contact, with J. Walter Thompson, a large consumer agency with an ethical department, but nothing materialized (Supp.A.372-373). She also contacted L.W. Frolich and Ted Bates and Co. (Supp. A. 379,380), two agencies with ethical advertising accounts, but met with no success.[27/] A management consulting firm contacted her with respect to an opening for an account executive, but was unable to place her when it found out that she could not be covered under its client's medical insurance policy (Supp.A.358).

McGee testified that she did not register at ethical advertising employment agencies, since she believed that as a result of the contacts she had made at the PAC meetings, everyone in the field

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27/ In October, 1974, after meeting with no success at ethical agencies, she sought a position at Norman, Craig, Kummel, a consumer agency but no jobs were available (Supp.A. 373; A.216).

knew that she was looking for work (Supp.A.385-386). In 1975, the Archer Agency, an employment agency that placed account executives at which McGee had registered, referred her resume to Braunworth of William Douglas McAdams where she previously had applied.[28/]

McGee additionally sought employment with ten firms which published trade magazines and organized audio-visual medical seminars, since she had acquired experience in these areas while working at the defendant (A.174, A.176; Supp. A.364, 365, 366, 367, 373A, 379, 380). Despite such efforts she was unable to obtain a job.[29/] Other attempts at obtaining employment outside her field were also unsuccessful.[30/] This evidence is more than sufficient to sustain the court's finding that McGee made reasonably diligent efforts to obtain

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28/ Archer included in its transmittal letter that McGee had filed a charge of sex discrimination against her previous employer (Supp. A. 422-423).

29/ One publication was afraid to hire her because of possible retaliation by defendant (Supp. A. 366, 387-388).

30/ McGee applied for a position at two government agencies (Supp.A.347,378). She was interviewed three times for a position at Rockefeller University for a position editing scientific articles but was rejected as overqualified (Supp.A. 375-376).

employment during this period.

Defendant attempts to discredit the reasonableness of McGee's efforts by pointing to several other actions she could have taken. As the court below stated "defendant's burden of proving a lack of diligence is not satisfied merely by showing that there were other actions that plaintiff could have taken in pursuit of employment" (A. 244). In any event, the actions suggested by defendant are in large measure of a questionable value. They certainly do not support a finding that the district court's decision was "clearly erroneous."

McGee apparently did not rely extensively on newspaper advertising to find employment leads (A. 246; Supp.A.389). Defendant's own evidence shows that it was not a valuable source. The only advertisements in McGee's field that defendant could establish were placed in the New York Times by Braunworth for Williams Douglas McAdams, a firm at which McGee had sought employment. Braunworth admitted that he placed no advertisements in 1974 (Supp. A. 405) and that he would often place two or three advertisements on different dates for the same position (Supp. A. 406-409).

Defendant claims that McGee should have consulted Ad Age and the Advertising Agency Red Book which Braunworth described as "the bible[s]" of the advertising world" (A. 212). These reference digests merely provide a list of agencies with their personnel but generally do not contain advertisements for positions (A.211-212, Supp.A. 397,398,417-418), although Ad Age each years publishes "occasional" employment advertisements for ethical positions in New York City (A. 209, 212-213; Supp.A. 416).

Braunworth's reference to sending out 500 resumes to consumer advertising firms around the country (Supp. A. 397) is clearly irrelevant to this case where only 20 ethical agencies exist.

Defendant also suggests that McGee should have placed greater reliance on resumes and contacted more of the ethical firms individually since there are so few of them (Def. br. at 40,36). The record reveals that McGee used approximately 80 to 90 resumes during the course of her attempts to secure employment (A.191-194,Supp.A.382). It also shows that, through PAC meetings and individually, she thoroughly canvassed the possibility of openings in substantially all agencies in her specialized field (Supp.A.390-391, 385). Plaintiff

adopted the same methods as Braunworth, i.e., word-of-mouth and personal contacts (Supp. A. 395, 396, 419). As the district court noted (A. 247):

> Plaintiff's use of the same method as that employed by an experienced personnel director was not unreasonable.

There is therefore no basis for concluding that either the means McGee employed or the efforts she made in attempting to secure alternative employment were not reasonable.

B. The District Court Properly Determined That McGee Was Entitled To Back Pay For The Period Between September 1975 and the Date the Decree Was Entered.

Following the court's decision that defendant had violated Title VII, McGee, in September, 1975, moved for reinstatement. After that point she no longer affirmatively sought employment (A. 188), but did not remove herself from the labor market. She remained registered with employment agencies previously contacted (Supp.A.377). Her resumes remained on file with pharmaceutical agencies where she had previously sought employment. As noted above, Braunworth of Williams Douglas McAdams had promised to keep her in mind if "pertinent positions" became available and he testified that he generally

continued to contact some candidates as long as two years after his last inquiry (Supp.A.395-396). Additionally, since the industry was so imbred, with everyone knowing the whereabouts of everyone else, there was a substantial likelihood that McGee, who was well known to be seeking employment, would be contacted if an opening were to arise. There were, however, no openings available.

By mid-1975 the job market for account executives, in the words of defendant's witnesses, "stunck terrible" (A.208). Under the circumstances the court's award of back pay for that period was fully justified. See, NLRB v. Mastro Plastics Corp., 354 F.2d 170, 179 (2d Cir. 1965); NLRB v. Chevrolet Sales, Inc., 493 F.2d 103, 108 (7th Cir. 1974). This is especially true since defendant refused to consider reinstatement of McGee even after the court's decision holding that it had violated the Act. Thus, it bears some responsibility for McGee's failure to gain employment during this period.

Defendant cites NLRB v. Madision Courier, Inc., 472 F.2d 1307, 1324 (D.C. Cir. 1972), for the proposition that it should not have been required to show that McGee would have been able to secure

employment if she had pursued that goal more actively. In that case, however, the court merely suggested that those claimants who had made no individual efforts to secure employment in their field would not be entitled to the benefit of the normal rule, well established in this circuit,[31] that the burden of proof is on the defendant to show lack of job availability. See NLRB v. Nickey Chevrolet Sales Co., supra, 493 F.2d at 708. That ruling does not apply here where McGee ceased actively to look for employment only after a diligent search of almost two years. Thus, the court's holding that the defendant failed to prove that McGee would have found employment had she been more diligent is correct. See Sparks v. Griffin, 460 F.2d 433, 443 (5th Cir. 1972); Hegler v. Bd. of Ed., 447 F.2d 1078, 1081 (8th Cir. 1971); Sprogis v. United Airlines, Inc., 517 F.2d 387, 392 (7th Cir. 1975).

C. Defendant's Contentions That McGee's Award Should Be Reduced In Other Respects Are Without Merit.

1. McGee informed the court and parties, in reference to another matter, that she had borrowed

31/ See NLRB v. Mastro Plastics Corp., 354 F.2d 170, 177 (2d Cir. 1965); Heinrich Motors, Inc. v. NLRB, 403 F.2d 145, 149 (2d Cir. 1968).

$10,000 during the course of three years of her case in order to continue to provide for her basic necessities.[32] At the hearings before the magistrate, defendant began questioning McGee about her loans for the purpose of determining her motivation to seek other employment, not for the purpose of determining whether the money should be considered as income (A. 181, 182, 183). The magistrate precluded this line of questioning, agreeing with McGee's counsel that her motivation was not relevant to a determination of whether she had made reasonably diligent efforts to seek employment (A.183). Defendant excepted to the magistrate's ruling, but never presented the issue to the court at any stage of the subsequent proceedings.

Defendant now contends that this Court should remand the case for consideration of whether any of the loans are not repayable and therefore are gifts which should be treated as "interim earnings" deductible from McGee's back pay award. There is no merit in this contention.

32/ The record indicates that she borrowed $2,000 from Chase Manhattan Bank, which she had to repay, presumably with interest (A. 180, 181).

Personal loans, whether repayable or not, cannot be considered earned income, since, whether loans or gifts, they are unrelated to employment. Gifts of groceries have been held not to be deductible. NLRB v. Brashear Freight Lines, 127 F.2d 198 (8th Cir. 1942). While in this circuit unemployment benefits and public assistance payments (EEOC v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579,591-592 (1976)) are deductible, these payments are made as part of a governmental policy of aiding those without employment. Private loans or gifts, whatever their motivation, friendship, compassion, etc., are in no way income which a person unjustly terminated could be deemed entitled to or obligated to receive. In any event, defendant failed to raise this issue before the magistrate or district court and should not be allowed to do so at this late date.

2. The defendant asks this court to reduce McGee's back pay award by the amount computed for the last eight months following the magistrate's hearing until entry of the district court's order on the theory that, during this period, there is no

sworn testimony that McGee remained unemployed. This is another issue which the defendant never raised before the district court and which should not be considered by this Court.

Some delay in the judicial process is inevitable. There will always be some delay between sworn testimony and decisions which assess damages as of that date. The system that defendant proposes would be endless, with continuing battles of affidavits up to the very moment of entry of the order. In any event, especially in this case where defendant is in large part responsible for the delay (A. 236), any unfairness is properly placed on the shoulders of the discriminator rather than the discriminatee. NLRB v. Rutter Rex Mfg. Co., 396 U.S. 258, 263-264 (1969).

III

THE DISTRICT COURT ERRED IN REFUSING TO ORDER McGEE'S REINSTATEMENT. IF, HOWEVER, THIS RULING IS AFFIRMED, THE COURT'S AWARD OF AN ADDITIONAL YEAR'S SALARY TO McGEE SHOULD BE UPHELD.

The issue we raise on our cross-appeal is whether the district court erred in refusing to reinstate McGee after finding that she had been discriminatorily discharged in violation of Title VII. The Commission's position is that this ruling should be reversed because it effectively deprives McGee, although innocent of any wrongdoing, of the most important aspect of complete relief--the right to the job she had earned through many years of hard work. If, however, the district court's ruling is upheld, then it is our position that the district court acted well within its area of discretion in awarding McGee, in lieu of reinstatement, additional salary for one year.

A. The Court Erred In Refusing To Reinstate McGee To The Position From Which She Had Been Discriminatorily Discharged.

In Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1976), the Supreme Court, in discussing back pay awards, pointed out that one objective of Title

VII is to "fashion the most complete relief possible" (Id., at 421) in order to make the victim of discrimination whole. It held (at 421) that back pay

> should be denied only for reasons which if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.

The same philosophy must necessarily guide other forms of relief.

As the district court itself pointed out, the public interest requires that section 704(a) be interpreted broadly in order to afford persons who engage in protected activities the assurance that they will not be prejudiced in their future employment opportunities (see supra, at 34). The very heartbeat of Title VII depends on the willingness of charging parties to assert their rights. Yet, if after doing so in as scrupulous a manner as possible, they are thrust out into an inhospitable job market in which they may not be able to find a position within their field of experience and skill, it is inevitable that the next person will think twice about taking any such action. The cases under the National Labor Relations

Act have, for these reasons, recognized the great significance of reinstatement in vindicating the public interest. See, e.g., NLRB v. Threads, Inc., 308 F.2d 1 (4th Cir. 1962). The importance of reinstatement as a vindication of constitutional rights, Pred v. Board of Public Instruction, 415 F.2d 851, 859 (5th Cir. 1969), and of federal and state policies against racial discrimination, Franklin v. County School Bd., 360 F.2d 325, 327 (4th Cir. 1966), has also been well established. The significance of reinstatement under Title VII is of no less importance [illegible] e federal policy of equal employment opportun[illegible] which the Supreme Court has referred to as of "highest priority." Alexander v. Gardner-Denver, 415 U.S. 36,47 (1974).

In McGee's case, the need for reinstatement in order to vindicate her rights is particularly acute. After six years of hard work, she rose through the ranks of the defendant agency to a responsible position at a good salary. The area of her experience and skills--account executive in ethical advertising--is highly specialized and, as the testimony of defendant's expert shows, the manner of her rise, without promotion and sales experience, has made it difficult for her to obtain another position, even in that

limited field. As a result, there are few vacancies occurring for which McGee would qualify given her particular background and salary requirements. Additionally, there is no doubt that many employers would not be anxious to hire McGee because of her having filed a charge of discrimination against defendant. Even if McGee does find suitable employment in the future, the struggle she has had to endure after winning her suit is not a prospect that others should have to experience.

The district court declined to reinstate McGee because it found that the position from which she had been discharged required a confidential relationship which had disintegrated because of the hostility engendered by the litigation. On that reasoning, almost no one discharged from an executive position for discriminatory reasons can hope for reinstatement. Most executive level positions require a confidential relationship between employer and employee analogous to that of McGee's former relationship with the defendant and, as the court recognized, almost all ligitation generates hostilities between the parties. If these factors alone bar reinstatement, then the higher level

employees, who have more to lose and may have greater difficulty in finding comparable employment than the worker, will be deterred from exercising their rights.

We recognize that reinstatement to an executive position like McGee's is a very sensitive matter. Where an employee, although engaged in protected activity, is in some way culpable for poisoning the possibility of an acceptable future working relationship, it would appear reinstatement should not be ordered. See NLRB v. King Louie Bowling Corp. of Mo., 472 F.2d 1192, 1193 (8th Cir. 1973)(employee "hardly blameless" for severely deteriorated relationship with manager); NLRB v. United Steelworkers, 357 U.S. 357 (1958), modifying on other grounds, United Steelworkers v. NLRB, 243 F.2d 593, 595 (D.C. 1956)(employee verbally assaulted fellow employees); Abbott v. Thetford, 534 F.2d 101 (5th Cir.)(en banc), reversing and adopting dissenting opinion, 521 F.2d 965, 701-708 (1976)(probation officer made personal criticism of judge). The more sensitive the position at issue the less culpable the employee would have to be before reinstatement could properly be withheld.

In this case, however, the district court did not point to any wrongful conduct on the part of McGee either before her discharge or during the litigation.

The court's reference to the litigation being marked "by more than the usual hostility between the parties" (A.250) appears to have been directed to counsel for defendant and McGee who sought, perhaps over aggressively, to represent their clients' interest (A. 236). In these circumstances denial of reinstatement is a punishment meted out to plaintiff and an approval,albeit a tacit one, of the defendant's recalcitrance in refusing to admit that it was wrong in discharging McGee.

We believe that on weighing the factors we have discussed--the need for vindication of the public interest, the severe effect on an identifiable class of executive employees, and the lack of culpability of McGee--against the court's single concern--speculative antagonism in the employment relationship which in large measure rests in the defendant's hands--the balance is decidedly in favor of reinstatement in this case.[33/]

33/ If no work is presently available, it would be appropriate to order that McGee be reinstated into the next available vacancy. McGee, of course, would be entitled to back pay up to that time.

B. If Reinstatement Is Not Ordered The District Court's Award Of One Year's Additional Salary Should Be Affirmed.

Having denied McGee reinstatement, the district court awarded her one year's additional salary in order to give her a fair opportunity in which to search for and secure employment. This type of relief has been approved by several other courts after denying reinstatement. Burton v. Cascade School Dist., 512 F.2d 850, 852-853 (9th Cir. 1975); NLRB v. King Louie Bowling Corp. of Mo., 472 F.2d 1192, 1193 (8th Cir. 1973); Hyland v. Kenner Products Co., ____F.Supp.____, 11 CCH EPD ¶10,926, 13 FEP Cases 1309, 1321-1322 (S.D. Ohio 1976). The defendant's characterization of the district court's award as "unprecedented" (Def. br., at 49) is thus erroneous.

The relief granted accords with the ruling of this Court that "[i]t is the date of actual remedying of discrimination, rather than the date of the district court's order, which should govern [the termination of back pay]." EEOC v. Enterprise Ass'n. Steamfitters, Local 638, 542 F.2d 579, 590-591 (2d Cir. 1976).[34/]

34/ Accord: Patterson v. American Tobacco Co., 535 F.2d 257, 268-269 (4th Cir. 1976).

The defendant claims that the award is defective because it makes no provision for the possibility that McGee could obtain a position within a year after the entry of the decree. The courts referred to above that have awarded similar relief of a limited duration, however, have not considered this a sufficient reason to bar such relief in light of the broad equitable powers of a district court to award appropriate relief. Additionally, the defendant should not be heard to complain, since it is its refusal to reinstate McGee that has created the need for further relief. Under these circumstances, the district court's award was within the appropriate exercise of its broad discretion.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that this Court affirm the order of the district court in this case, except to the extent that the order denies plaintiff-intervenor McGee reinstatement to the position from which she was discriminatorily discharged. This court should reverse this aspect of the district court's order and remand the case with instructions to reinstate McGee. If, however, the district court's ruling as to reinstatement is upheld, its award of an additional year's salary to McGee in lieu of reinstatement should be affirmed.

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March 21, 1977

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of the Equal Employment Opportunity Commission as Appellee, Cross-Appellant, and one copy of a Supplemental Appendix have been mailed this day, March 21, 1977, postage prepaid, to the following counsel of record:

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